SPA 628-630.[2] By then, some Cayugas who abandoned their lands during the war had settled in Canada. U.S. App. 202a. The majority of Cayugas who remained in the United States settled near Buffalo Creek, in western New York, with other members of the Iroquois tribes who had settled there after the Revolution. U.S. App. 201a. A small Cayuga minority returned to Cayuga Lake. U.S. App. 201a-202a.

In response to Iroquois attempts to sell their former aboriginal lands privately, U.S. App. 207a-212a, New York Governor George Clinton signed a treaty with the Cayugas in February 1789. SPA 631-634.[3] In that treaty, the Cayugas ceded all their aboriginal lands – approximately 1,600 square miles or 3 million acres – "to the People of the State of New York forever" in exchange for a cash payment and an annuity. New York set aside one hundred square miles of the ceded lands for the common "use and cultivation" of the Cayugas. SPA 632. This parcel is the land at issue here. U.S. App. 213a.

On November 11, 1794, the United States and the Cayugas, among other Iroquois tribes, signed a treaty at Canandaigua, New York. Treaty of November 11, 1794, 7 Stat. 44, Tr. App. 390a-394a. In article II of the Treaty, the United States acknowledged the lands set aside for the Cayugas in the 1789 treaty and authorized the Cayugas to

2. "SPA" refers to the two volume Special Appendix filed with the court of appeals pursuant to Second Circuit Rule 32(d). "C.A. App." refers to the Joint Appendix and the Deferred Appendix filed with the court of appeals pursuant to Fed. R. App. P. 30.

3. The United States' assertion that the State dealt with minority factions of individual Tribes at the time of the 1789 treaty, "despite Governor Clinton's awareness that Iroquois protocol required consent from authorized representatives of all Six Nations" (U.S. Pet. 3), was expressly rejected by the district court. U.S. App. 220a-222a.

sell them to "the people of the United States, who have the right to purchase" (Tr. App. 391a). This provision authorized the Cayugas to sell their land only to New York State because the State held the right of preemption.[4]

During the Canandaigua treaty negotiations, the Cayugas several times asked Timothy Pickering, the United States treaty negotiator, to assist them in selling to New York the lands set aside for them in the 1789 treaty. U.S. App. 242a-244a. Pickering apparently consulted with President Washington, and at the President's direction in January 1795 forwarded to Governor Clinton the Cayugas' request to sell their lands. C.A. App. A9618-A9619.

Thereafter, the United States Attorney General opined that, "unless there be something in the circumstances of the case under consideration to take it out of the general prohibition of the law," the proposed sale required a federal treaty under the 1793 Nonintercourse Act.[5] U.S. App. 253a-254a. New York's

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4. The "right of preemption" is the underlying fee title to lands subject to the Indian right of occupancy, which ripened into fee simple absolute title when the Indian right of occupancy was extinguished. *See Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974) ("*Oneida I*"). The original thirteen states, including New York, held the right of preemption to lands within their boundaries. *See Sherrill*, 125 S. Ct. at 1483 n.1 ("[i]n the original 13 States, 'fee title to Indian lands,' or 'the pre-emptive right to purchase from the Indians, was in the State'").

5. On July 22, 1790, Congress passed the first Indian Trade and Intercourse Act. *See* 1 Stat. 137, Tr. App. 384a-385a. Section 4 of that statute is commonly referred to as the Nonintercourse Act. *See id.* On March 1, 1793, Congress revised the Nonintercourse Act, Tr. App. 385a, providing, in part:

(Cont'd)

new governor, John Jay, observed in response that the 1795 treaty arrangements were completed before he took office and thus he need not decide whether the Nonintercourse Act and the New York statute authorizing the 1795 treaty were constitutional. U.S. App. 259a. After considering the Attorney General's conclusion and Governor Jay's response, President Washington concluded, on the day the 1795 treaty was signed, that if it had already occurred, "any further sentiment *now* on the unconstitutionality of the measure would be recd. too late." U.S. App. 256a.

In the 1795 treaty (SPA 687-690), the Cayugas ceded to the State their rights in 60,815 of the 64,015 acres set aside for them in the 1789 treaty, retaining rights in a two-mile-square tract for the small group of Cayugas still residing at Cayuga Lake. In return, they received a perpetual annuity of $1,800.[6] U.S. App. 249a. The United States Indian agent for the Six Nations and an interpreter in the federal service attended and

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> "[t]hat no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution; . . ."

The Indian Trade and Intercourse Act, including the Nonintercourse Act, was reenacted in 1796, 1799, 1802, 1834 and 1874. The Nonintercourse Act, now Rev. Stat. § 2116, is codified at 25 U.S.C. § 177. U.S. App. 541a.

6. The district court rejected the Nation's and the Tribe's assertion that the State acted improperly by entering into the 1795 treaty with the Cayuga majority from Buffalo Creek. *See* U.S. App. 269a-270a; *compare* Tr. Pet. 6.

signed the treaty as witnesses.[7] U.S. App. 428a-431a. During the eight months between the signing of the 1795 treaty and its ratification by the New York State Legislature (SPA 691-697), the United States did nothing to void the treaty or even to "notify the State that it deemed that [t]reaty to be invalid under the Nonintercourse Act." U.S. App. 261a. The following year, the land was subdivided, surveyed and then resold to settlers and speculators for more than the Cayugas received, the difference resulting from the subdivision, as well as land speculation and the very generous credit terms offered by the State.

From 1795 until 1992, when it intervened in this action, the United States never questioned the validity of the Cayugas' 1795 and 1807 treaties with New York. Indeed, in the early part of the 19th century, the United States pursued a policy of removing Indian tribes, including the Cayugas, to the western frontier. *See Sherrill*, 125 S. Ct. at 1485. For their part, the Cayugas agreed in an 1838 federal treaty to remove to land set aside for the New York Indians in modern-day Kansas "as a future home" and received compensation for relocating. Treaty of January 15, 1838, 7 Stat. 550, arts. 2, 11, SPA 708-710. In 1853 and 1861, the few Cayugas who remained in New York sought, on equitable grounds, additional compensation from the State for the 1795 and 1807 sales, but did not seek to regain sovereignty or exclusive possession of their former land. U.S. App. 295a-296a.

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7. The United States Indian agent was also present and signed and witnessed the 1807 agreement by which the Cayugas ceded their remaining lands to New York. U.S. App. 429a; *Cayuga Nation v. United States*, 36 Ind. Cl. Comm. 75, 80 (1975). C.A. App. A1012. The United States Indian agents initially transmitted New York's annuity payments to the Cayugas. *See Cayuga Nation v. United States*, 28 Ind. Cl. Comm. 237, 245 (1972). C.A. App. A979.

Approximately forty years later, the Cayugas remaining in New York again asked for more money from the State. U.S. App. 296a, 458a. In the proceedings that followed, their lawyer wrote that "[t]he Cayugas want no lands of the whites," and that if the additional compensation were used to purchase land, it would be only land located on the Senecas' reservation, where many Cayugas resided. C.A. App. A10470. In 1931, the parties finally settled the claim, thereby averting the Cayugas' 1911 threat to ask the United States to sue the State (C.A. App. A8738-A8745, A10482-A10483). The Nation still receives annual interest payments of more than $21,000 under the settlement. U.S. App. 458a; SPA 725-726.

In 1951, the Tribe sued the United States in the Indian Claims Commission ("ICC"), claiming that the federal government breached its fiduciary duty by not protecting the Tribe's interests at the 1795 and 1807 treaties with New York. U.S. App. 458a. In defending that lawsuit, the United States argued, contrary to its claims here, that the Canandaigua Treaty did not confer any rights on the tribes and did not divest or impair New York's rights and that the 1795 and 1807 treaties did not violate federal law.[8] C.A. App. A10684-A10694. In 1972, the ICC determined that the United States breached its fiduciary duty to the Tribe, *Cayuga Indian Nation v. United States*, 28 Ind. Cl. Comm. 237, 249-50 (1972), and in 1975, the Tribe and the United States settled the ICC claim for $70,000, U.S. App. 458a.

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8. The U.S. made similar arguments in defending New York's conduct before an International Arbitration Tribunal that adjudicated a British claim on behalf of the Canadian Cayugas who had not been paid their share of the New York treaty annuities since just before the War of 1812. U.S. App. 439a-440a; C.A. App. A10540-A10541. In 1926, the Tribunal concluded that the 1795 treaty was subject only to New York law and that the United States did not have an interest in it. C.A. App. A9066-A9068.

Proceedings Below

The Nation commenced this action in 1980, alleging "that [the 1795 and 1807] transactions are void . . . and that because the present owners and occupiers of the lands within the claim area all trace title to either the 1795 or the 1807 transactions, their titles and interests are void." *Cayuga Indian Nation v. Carey*, 89 F.R.D. 627, 630 (N.D.N.Y. 1981). The Nation sought:

> (1) a declaration of their current ownership and right to possess the land in question; (2) an order restoring the plaintiffs to possession of the land and ejecting the defendants; (3) an accounting of all taxes paid on the land from 1795 to the present; [and] (4) trespass damages in the amount of the fair rental value of the land since plaintiffs' dispossession; . . .

U.S. App. 479a. The named defendants included numerous state administrative agencies and officials, Cayuga and Seneca counties, local governmental agencies and officials, utilities, and various commercial and individual landowners. U.S. App. 472a. Thereafter, the Tribe intervened and the district court certified a defendant class of thousands of private landowners pursuant to Fed. R. Civ. P. 23(b)(1)(B). U.S. App. 472a-473a; *Cayuga Indian Nation v. Carey*, 89 F.R.D. at 633.

Defendants then moved to dismiss the complaints for lack of subject matter jurisdiction and for failure to state a claim, but those motions were largely denied in *Cayuga I*.

U.S. App. 466a-536a.[9] Over the next eight years, the court issued five decisions rejecting numerous defenses raised by respondents and finding that both the 1795 and 1807 treaties violated the Nonintercourse Act. *Cayuga II- Cayuga VI*, Tr. App. 49a. Specifically, the district court rejected the defense of laches based on its conclusion, long before this Court's decision in *Sherrill*, that Second Circuit precedent barred a laches defense. *See* U.S. App. 388a-399a. The court granted partial summary judgment on liability to the Nation and the Tribe against all respondents except the State. U.S. App. 399a.

The State was not subject to liability at that juncture because it had reasserted an Eleventh Amendment immunity defense based on this Court's decision in *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991). U.S. App. 391a n.2. In response, the United States intervened in November 1992, C.A. App. A2592-A2601, and the district court eventually granted summary judgment against the State as well. *See Cayuga Indian Nation of New York v. Pataki*, 79 F. Supp. 2d 78, 80-81 (N.D.N.Y. 1999) ("*Cayuga XII*"). The United States sought a declaration that the thousands of current landowners be ejected and an award of trespass damages to the Nation and the Tribe. *See* U.S. App. 359a-360a (all three petitioners sought ejectment); C.A. App. A2597.

During the remedy phase of the litigation, the Nation and the Tribe maintained that they had an exclusive possessory interest in the subject lands and that title lawfully rested with them. U.S. App. 365a. The district court stated

9. The district court's seventeen written decisions, identified as *Cayuga I-XVII*, but not including the earliest decisions on class certification and intervention, are listed at Tr. App. 49a-50a.

that "the state never acquired any legal title to the Cayuga land by virtue of the treaties of 1795 and 1807," C.A. App. A6490, but based on its assessment of equitable factors, ruled that ejectment was not a proper remedy. U.S. App. 359a-387a. The court permitted petitioners at a jury trial to seek trespass damages for the Cayugas' two-century loss of possession and current fair market damages in lieu of ejectment; it also conducted a separate proceeding to determine the extent of any prejudgment interest on the jury verdict. *See Cayuga Indian Nation v. Pataki*, 1999 U.S. Dist. LEXIS 5228 (N.D.N.Y. 1999) ("*Cayuga VIII*"); *Cayuga Indian Nation of New York v. Pataki*, 79 F. Supp. 2d 66 (N.D.N.Y. 1999) ("*Cayuga XI*"); *Cayuga XII*.

The jury awarded petitioners $35 million in current fair market value damages and approximately $1.9 million in fair rental value damages (after crediting the State's payments to the Cayugas) for their loss of use and possession from 1795 to the time of the trial. *See* U.S. App. 122a-123a, 126a-127a. Following a bench trial, the court awarded the Nation and the Tribe over $211 million in prejudgment interest compounded from July 1795, for a total of slightly under $248 million. U.S. App. 320a-321a. Although the court had allowed petitioners to seek damages only from the State, *Cayuga XI*, 79 F. Supp. 2d at 74, 77, it allowed the non-state respondents to participate in the appeal on liability issues and the Nation and the Tribe to pursue the denial of ejectment against all respondents. *See* U.S. App. 54a-57a, 75a-84a.

On appeal, the Second Circuit dismissed the complaints based on this Court's decision in *Sherrill*, which was issued while the appeal was pending. *See* U.S. App. 1a-27a. The court of appeals found that "*Sherrill's* holding is not narrowly limited to claims identical to that brought by the Oneidas

. . . but rather, . . . these equitable defenses apply to 'disruptive' Indian land claims more generally." U.S. App. 15a. The court determined that petitioners' claim "sounding in ejectment" is just as disruptive as *Sherrill's* request for reinstatement of sovereignty because it seeks immediate possession of the subject land (*id.* at 16a); that the "the same considerations that doomed the Oneidas' claim in *Sherrill* apply with equal force here" (*id.* at 21a); that damages in lieu of ejectment are barred because ejectment is barred (*id.* at 22a-23a); that petitioners' request for trespass damages is barred because it "is predicated entirely upon [petitioners'] possessory land claim" (*id.* at 23a); and that in this case the United States is subject to the defense of laches (*id.* at 23a-26a) because, *inter alia*, "a suit based on events that occurred two hundred years ago is about as egregious an instance of laches on the part of the United States as can be imagined" (*id.* at 25a). District Judge Hall dissented in part from the majority's dismissal of petitioners' claims for damages, finding them not barred by laches. U.S. App. 36a.

REASONS FOR DENYING THE PETITIONS

Over twenty years ago, in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 244-45 (1985) ("*Oneida II*"), this Court left open the question whether laches might bar an ancient tribal possessory land claim. But last term, in *Sherrill*, the Court squarely addressed the applicability of delay-based equitable defenses in this context, holding that laches, acquiescence and impossibility barred the Oneida Nation's claim to renewed sovereignty over its former lands because of the inordinate delay in asserting the claim. The Court emphasized that "the unilateral reestablishment of present and future Indian sovereign control, even over land purchased at the market price, would have disruptive practical

consequences" because the resulting checkerboard jurisdiction would seriously burden the administration of state and local governments and adversely affect neighboring land owners. *Sherrill*, 125 S. Ct. at 1493. Because the Oneida Nation sought to "project [its] redress . . . into the present and future," *id.* at 1494 n.14, the claim was inherently disruptive and thus was "best left in repose." *Id.* (quoting *Oneida II*, 470 U.S. at 273 [Stevens, J., dissenting]).

The court of appeals' decision that the same equitable considerations bar a tribal lawsuit claiming an exclusive possessory right to 64,015 acres relinquished by the Cayugas over 200 years ago follows directly from this Court's holding in *Sherrill*, and there is no reason for this Court to revisit the issues it decided just last term. The central claim underlying any relief here is the equally disruptive assertion that the 1795 and 1807 treaties are void and thus that the Cayugas' exclusive right of possession continues today. The district court judgment created continuing uncertainty, casting doubt on land title and marketability. There is no conflict among the circuits on this issue, and the Nation and the Tribe concede that "no Circuit split is ever likely to develop." Tr. Pet. 4. Nor do petitioners' claims that the application of laches contravenes the congressional policy set forth in 28 U.S.C. § 2415 and that laches cannot apply to the United States raise important federal questions meriting review. Accordingly, a grant of certiorari is unwarranted.

I. The Court of Appeals' Decision Properly Construed *Sherrill* And Does Not Conflict With *Oneida II*.

A. The Court of Appeals properly applied *Sherrill* to dispose of this action.

The court of appeals correctly determined that the federal delay-based doctrines that foreclosed relief in *Sherrill* are equally applicable to an asserted possessory right, and thus bar restoration of the disputed lands to tribal possession. *Sherrill* itself relied on *Yankton Sioux Tribe v. United States*, 272 U.S. 351, 357 (1926), and *Felix v. Patrick*, 145 U.S. 317, 334 (1892), where this Court refused to award possession of former Indian lands because of "the impracticability of returning to Indian control land that generations earlier passed into" the hands of "innumerable innocent purchasers." *See Sherrill*, 125 S. Ct. at 1492-93 (quoting *Yankton*, 272 U.S. at 357).[10] *Sherrill* also noted approvingly the refusal of the same district judge who handled this case to eject 20,000 private landowners in the Oneida land claim. *See Sherrill*, 125 S. Ct. at 1489, 1493.

The court of appeals properly viewed these same considerations as dispositive here. U.S. App. 21a; *see Sherrill*, 125 S. Ct. at 1490. The treaties in dispute are ancient and the rights under them long thought settled. For generations, the property has been owned by "innumerable innocent purchasers." *Id.* at 1493. Since before 1800, most

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10. Contrary to the claim by the United States, U.S. Pet. 16, the Supreme Court did not award damages to the Indians in *Yankton* and *Felix* for the lands that were then in the hands of the innocent purchasers. *See Yankton*, 272 U.S. at 359 (awarding just compensation for an Indian-owned quarry tract that the United States had taken and possessed); *Felix*, 145 U.S. at 335 (affirming decree dismissing the bill).

of the Cayugas have resided elsewhere, and the area and its inhabitants are distinctly non-Indian in character. U.S. App. 21a. Additionally, subsequent landowners developed the lands from an empty wilderness to the many towns, villages and improvements in the region, and the lands are worth incalculably more than they were when the Cayugas sold them over 200 years ago. Finally, as in *Sherrill*, and as discussed at Point II. B. below, "[f]rom the early 1800's into the [1990's], the United States largely accepted, or was indifferent to . . . the validity *vel non* of the [Cayugas'] sales to the State." *Sherrill*, 125 S. Ct. at 1490. Thus, as even the dissent below recognized, *Sherrill* "supports the majority's conclusion that the plaintiffs cannot obtain ejectment of those currently in possession of" the Cayugas' former land. U.S. App. 28a.

Petitioners do not seriously dispute this holding here, electing instead to ignore more than two decades of litigation in this dispute during which they claimed title and possession of the lands, and arguing that laches cannot bar a damages judgment. *Cf.* U.S. App. 16a ("[petitioners'] claim is and has always been one sounding in ejectment"). But this contention that *Sherrill* did not foreclose the vindication of petitioners' possessory claim by an award of damages provides no basis for a grant of certiorari. *See* U.S. Pet. 15; Tr. Pet. 18-19. Their argument ultimately fails, as the court of appeals concluded, because petitioners' requests for declaratory and monetary relief are inextricably intertwined with the underlying possessory claim. Any relief here would flow directly from the finding that the Cayugas are entitled to possession. Rejection of that disruptive claim due to equitable considerations of laches, acquiescence and impossibility likewise precludes any relief, including money damages.

This matter has always been properly characterized as an ejectment action based on the Cayugas' loss of their former lands.[11] The district court construed the tribal complaints as setting forth "a traditional possessory claim" that is "basically in ejectment," U.S. App. 505a, 507a, and viewed the United States' complaint-in-intervention as "virtually identical." U.S. App. 350a. Until their petition here, the Nation and the Tribe steadfastly pursued ejectment over years of litigation. Even after the district court denied ejectment as a remedy, the Nation and the Tribe sought in their cross-appeal to eject all respondents. Finally, the Nation and the Tribe viewed the district court's rulings in their favor on liability as the equivalent of a declaration that they, not the current landowners, were the rightful owners of the land. *See Cayuga XI* at 74; U.S. App. 365a; C.A. App. A6490.

In an effort to avoid application of the delay-based defenses just endorsed by this Court in *Sherrill*, petitioners

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11. That petitioners' claim is also based upon the Nonintercourse Act has no bearing on the court's authority to dismiss the claim based upon "standards of federal Indian law and federal equity practice." *Sherrill*, 125 S. Ct. at 1489-90. In *Sherrill*, the Oneida Nation argued that any foreclosure for nonpayment of taxes would be barred by the Nonintercourse Act because that statute contained a restraint against any alienation of tribal land without federal consent. *See* Br. for Respondents filed in the Supreme Court in *Sherrill*, 2004 U.S. S. Ct. Briefs LEXIS 648 at **38, **55. Nevertheless, this Court held that equitable considerations barred the Oneida Nation from suing to block the application or enforcement of state real estate tax laws. *Sherrill*, 125 S. Ct. at 1489 n.7. This conclusion is bolstered by this Court's holdings in *Oneida I* and *Oneida II* that Indian land claims are judicially cognizable, *see Oneida I*, 414 U.S. at 667; *Oneida II*, 470 U.S. at 248-50, and thus may be finally resolved by the federal courts through a binding judgment. *See* U.S. Pet. 17.

suggest that the essentially possessory nature of their claim was transformed by the award of damages in lieu of possession many years after this action began. In *United States v. Mottaz*, 476 U.S. 834, 842 (1986), this Court recognized that, although plaintiff dropped her claim for rescission of improper sales by the United States of her interest in Indian allotments, her demand for damages equal to their current fair market value amounted to "a declaration that she alone possesses valid title to her interests in the allotments and that the title asserted by the United States is defective." Likewise, petitioners' claim is effectively one for possession of their former lands.[12]

For this reason, any award of damages would be extremely disruptive, despite petitioners' blithe contentions to the contrary. *See* U.S. Pet. 15; Tr. Pet. 19. If this lawsuit is not dismissed, nothing prevents the Nation and the Tribe from pursuing against the non-State respondents the broad-based declaratory relief requested in their complaints. Any declaration that the Cayugas have a current exclusive possessory right in and title to the subject lands, even in the absence of ejectment, could jeopardize local mortgages and inhibit investment in local real estate and businesses. *See* U.S. App. 18a ("any remedy . . . which would call into

12. This is true of trespass damages, as well as petitioners' claim for fair market value. As the court of appeals concluded, "there can be no trespass unless the Cayugas possessed the land in question." U.S. App. 23a (citation omitted). Under the common law, the claim for trespass damages for past use and occupation of the land, otherwise known as mesne profits, *see* U.S. App. 9a, is derivative of the underlying possessory cause of action. *See Roberts v. Cooper*, 60 U.S. 373, 375 (1857) (loss sustained "by being kept out of the possession of [one's] land"); *Kountze v. Omaha Hotel Co.*, 107 U.S. 378, 388 (1883) (same).

question title to over 60,000 acres of land in upstate New York, can only be understood as" a disruptive remedy).

Additionally, the potential award of billions of dollars in money damages in this case and the other New York land claim cases would have a dramatic impact on the State's budgetary and fiscal planning and place an extraordinary burden on the State's taxpayers. *Oneida II* did not sanction such huge damages awards. There, the Oneidas sought damages for the loss of use of possession of about 872 acres of County-owned land for two years, *see Oneida II*, 470 U.S. at 230; *see also id.* at 266 (Stevens, J., dissenting), and eventually obtained an award of $18,270 plus interest from 1968. *See Oneida Indian Nation v. County of Oneida*, 214 F.R.D. 83, 87 (N.D.N.Y. 2003).

Finally, the Nation and the Tribe claim the right to seek damages from individual landowners and the local municipal defendants if they do not obtain full relief from the State. *See Cayuga XI*, 79 F. Supp. 2d at 72 (holding that damages against all respondents, including individual landowners, are divisible and capable of reasonable allocation), 77 (noting possible later damages trials); C.A. App. A5396-A5397. A large damages award against individual landowners and local municipalities would obviously have devastating consequences.

Accordingly, both the nature of petitioners' possessory claims and petitioners' repeated invocation of their exclusive right to possess the entire 100-square-mile claim area support the holding of the court of appeals that, in foreclosing the tribes' right to possession, *Sherrill* precluded any relief in this action. Because this Court has squarely addressed the effect of disruptive ancient tribal claims in *Sherrill*, and because there is no circuit split on this issue, the Court need not address the issue further and should deny the petitions for certiorari.

B. The holding below does not conflict with *Oneida II*.

Petitioners mistakenly assert that the decision below conflicts with *Oneida II*. Although in *Oneida II* the Court held that the Oneidas could maintain a federal common law cause of action for damages for a violation of their possessory right, it expressly declined to consider whether "the Oneidas' claim is barred" by laches because defendants had not preserved that defense. *See Oneida II*, 470 U.S. at 244-45. On the other hand, the four dissenting Justices who reached the merits of the laches defense in *Oneida II* correctly presaged the ruling below that laches can bar an ancient possessory lawsuit. *Id.* at 255-73. Although the *Oneida II* majority provided several "observations in response to the dissent" on whether laches could be applied in that case, *id.* at 244-45 n.16, these "observations" cannot be treated as rulings of the court.[13]

Moreover, the Court's statement in *Sherrill* that it did "not disturb our holding in *Oneida II*" was premised solely on the fact that, in *Sherrill*, "the question of damages for the [Oneidas'] ancient dispossession" was not at issue. *See Sherrill*, 125 S. Ct. at 1494; *see also Oneida II*, 470 U.S. at 230. As the United States acknowledges (U.S. Pet. 15), in *Sherrill*, the Oneida Indian Nation sought only declaratory and injunctive relief, *see* 125 S. Ct. at 1489, and thus, the

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13. In light of *Sherrill*, there is no merit to petitioners' suggestion (*see* U.S. Pet. 13; Tr. Pet. 17) that the application of an equitable defense is not appropriate in an ejectment action because at common law ejectment was considered to be a legal rather than an equitable action. *See Sherrill*, 125 S. Ct. at 1494 n.14 (no novelty in applying equitable defenses "when the specific relief [the Oneida Nation] now seeks would project [its] redress . . . into the present and future"); *see also* U.S. App. 18a n.5 (citations omitted).

Court was not required to reconsider its holding in *Oneida II* that the Oneida Nation could maintain a federal common law cause of action for damages for a violation of their possessory right. Significantly, although *Sherrill* did not "disturb" *Oneida II*, the majority repeatedly cited Justice Stevens' dissenting opinion finding laches a complete defense to the lawsuit. *See Sherrill*, 125 S. Ct. at 1490 & n.9, 1492 & n.12, 1494 n.14. As in *Sherrill*, petitioners' extraordinary delay in pursuing this possessory land claim "cannot . . . be ignored here as affecting only a remedy to be considered later; it is, rather, central to [their] very claims of right." *See Sherrill*, 125 S. Ct. at 1494 (Souter, J., concurring). Thus, the decision below does not conflict with *Oneida II*.

II. The Other Issues That Petitioners Raise Do Not Present An Important Federal Question Warranting Review By This Court.

A. The application of laches in this case is not inconsistent with 28 U.S.C. § 2415.

Petitioners' claim that the decision below is at odds with the congressional policy expressed in 28 U.S.C. § 2415 is unpersuasive and does not warrant a grant of certiorari. U.S. Pet. 21-25, Tr. Pet. 27-28. The statutes of limitations established in section 2415 do not apply to "an action to establish the title to, or right of possession of, real or personal property." 28 U.S.C. § 2415(c). Congress has adopted no statute of limitations for tribal possessory and title claims such as the present one. *See Oneida II*, 470 U.S. at 240 ("[t]here is no federal statute of limitations governing federal common-law actions by Indians to enforce property rights"); *see also Mottaz*, 476 U.S. at 848 n.10 (same). Not surprisingly, in *Sherrill*, this Court did not find it necessary even to discuss whether section 2415 evinced a congressional

policy barring the Court's application of laches, acquiescence and impossibility.

The absence of a federal statute of limitations does not preclude the laches defense. Where Congress intends to bar laches as a defense to Indian claims, it has said so. *See* Indian Claims Commission Act, ch. 959, § 2, 60 Stat. 1049, 1050 (1946) (the ICC may hear and determine specified claims against the United States "notwithstanding any statute of limitations or laches"); 25 U.S.C. § 640d-17(b) (Act settling certain Indian land claims provides that "[n]either laches nor the statute of limitations shall constitute a defense to any action authorized by this subchapter for existing claims if commenced within" specified periods). Even if section 2415 applied to petitioners' claims, Congress did not expressly preclude the laches defense in this provision, and the application of laches by the court below therefore is not "a violation of Congress' will." *Cf. Oneida II*, 470 U.S. at 244 (concluding that it would violate Congress's will "to hold that a state statute of limitations period should be borrowed in these circumstances"). Nor is there any indication that in enacting or amending section 2415, Congress intended to revive ancient Indian claims seeking possession of or title to land that were barred by laches over a century before. *See Oneida II*, 470 U.S. at 271-72 (Stevens, J., dissenting) (§ 2415[c] merely reflects an intent to preserve the law as it existed on the date of enactment).

In any event, this Court has held that laches may bar actions that are otherwise within the statute of limitations. *See Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) ("[a] suit in equity may fail though 'not barred by the act of limitations'") (quoting *McKnight v. Taylor*, 42 U.S. 161, 168 (1843)); *Alsop v. Riker*, 155 U.S. 448, 460-61 (1894) (equity

may refuse relief "even if the time elapsed without suit is less than that prescribed by the statute of limitations"); *see also Gardner v. Panama R. Co.*, 342 U.S. 29, 31 (1951) (use of laches "should not be determined merely by a reference to and a mechanical application of the statute of limitations," but rather depends upon the court's discretion). Accordingly, even if section 2415 applied and this action was timely brought under that section, the court of appeals' holding that laches nevertheless bars the claim fits squarely within this Court's holdings.

B. The application of laches to the United States does not conflict with this Court's decisions or present a question of substantial importance.

The court of appeals' application of laches, acquiescence and impossibility to the United States does not raise an important federal question requiring this Court's review. As the court below concluded, this Court has acknowledged that an action by the United States may be precluded by laches, even when the United States is acting in its sovereign capacity. *See* U.S. App. 24a-25a; *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 373 (1977) ("inordinate EEOC delay" in bringing Title VII enforcement action may preclude relief). Particularly here where the federal government's 197-year delay in suing is egregious and the United States abruptly challenged land titles that it had defended for generations, the decision below breaks no new ground. *See, e.g., Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 61 (1984) (equitable estoppel may apply against the United States where necessary to vindicate the "interest of citizens in some minimum standard of decency, honor and reliability in their dealings with their Government").

Contrary to petitioners' assertions, neither *Heckman v. United States*, 224 U.S. 413 (1912), nor *United States v. Minnesota*, 270 U.S. 181 (1926), supports a grant of certiorari here. *See* U.S. Pet. 26; Tr. Pet. 25-26. In *Heckman*, unlike this case, the United States, acting on behalf of Indian allottees, promptly sued the original grantees of the invalid conveyances. The Court upheld the United States' capacity to sue on behalf of its Indian wards, finding "the governmental rights of the United States" at stake. *Heckman*, 224 U.S. at 438. Similarly, in *Minnesota*, the Court held that the United States had a "real and direct interest" as sovereign arising out of its guardianship over the Indians. 270 U.S. at 194. Neither case involved laches.[14] Significantly, in *Minnesota*, 270 U.S. at 195, the Court analogized the interest of the United States to that in *United States v. Beebe*, 127 U.S. 338, 346-48 (1888), where the United States' suit to cancel land patents was barred by laches since the United States was "a mere formal complainant" in the suit on behalf of private persons. Here, the United States did not bring the suit but intervened twelve years after the suit began to overcome New York's invocation of its Eleventh Amendment immunity. The court of appeals correctly concluded that, whatever the interest of the United States in trying at this late date to revive the ancient tribal right of possession by overturning land titles secure for centuries, its egregious 200-year delay bars this claim.

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14. In *Minnesota*, the Court rejected the State's argument that the case was untimely under federal and state statutes of limitations. *See* 270 U.S. at 195-96.

CONCLUSION

The petitions for writs of certiorari should be denied.

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No. 05-978

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE E. PATAKI, GOVERNOR OF THE STATE OF NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

Respondents contend that the suits filed by the Cayugas and the United States warrant dismissal under *City of Sherrill* v. *Oneida Indian Nation*, 125 S. Ct. 1478 (2005), because they are disruptive of settled expectations; that no statutory or other barrier exists to the application of laches in this setting; and that the issues presented here are not of sufficient importance to warrant this Court's review. Those arguments lack merit. Because the relief awarded by the district court was limited to money damages, this case is controlled not by *City of Sherrill* but by *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226 (1985) (*Oneida II*), in which this Court allowed functionally indistinguishable damages claims to go forward. The court of appeals' disposition of this case is contrary to *Oneida II*, to Acts of Congress specifically designed to govern the timeliness of claims like these, and to the settled principle that the United States is not subject to laches when it sues in its sovereign capacity. The practical effect of the court's decision is to render nugatory extended litigation (in this and similar cases) that has proceeded in reliance on *Oneida II*, even though the Cayugas' claims were endorsed by the United States and both the tribal and governmental complaints were timely filed under the applicable statutes of limitations. Furthermore, the result of the decision below is to preclude *any* redress for "grave" wrongs by the State of New York, *City of Sherrill*, 125 S. Ct. at 1491 n.11, in violation of treaty and statutory protections of the Tribes' lands. In light of the court of appeals' broad ruling, only review by this Court can now ensure that the United States will be able to fulfill its obligations to obtain redress for the Cayugas and other New York Indians whose lands

were obtained from them in violation of explicit treaty and statutory provisions. See *Heckman* v. *United States*, 224 U.S. 413, 437 (1912); Pet. 26. For all these reasons, the petition for a writ of certiorari should be granted.

A. This Court's Decision In *City Of Sherrill* Does Not Support Respondents' Position

Respondents contend (Br. in Opp. 13-17) that judicial consideration of the land claims filed by the Cayugas and the United States entails unacceptably disruptive consequences, and that the court of appeals' decision in this case therefore follows logically from *City of Sherrill*. Respondents' reliance on *City of Sherrill* is misplaced.

1. Respondents emphasize (*e.g.*, Br. in Opp. 15) that the Cayugas have pursued an ejectment remedy throughout this litigation. As our petition for a writ of certiorari explains (at 19-20), however, it is an established principle of federal civil procedure that, if a plaintiff's claim is meritorious and the district court can identify *some* form of appropriate relief, the plaintiff's own failure specifically to request that remedy in its complaint provides no basis for dismissal of the suit. Respondents do not address that point; they make no effort to ground their argument in generally applicable procedural rules; and they cite no case holding that a plaintiff's request for relief that a court later declines to award on equitable grounds justifies dismissal of its complaint.

Thus, if the district court had determined at the outset of this case that equitable considerations would bar ejectment of the current landowners, the court could not have dismissed the suit on that ground. Although the district court did not rule definitively on that remedial question until 1999 (see Pet. App. 359a-387a), the court made clear as early as 1983 that an order ousting current landholders would not necessarily follow from a favorable ruling on the merits of the Cayugas'

claims, and that an award of money damages might ultimately be found to be an appropriate substitute. See *id.* at 485a; Pet. 20 n.2. As a practical matter, the suit thus proceeded in the same way as if the Cayugas' complaints had included prayers for damages for the value of the land as an alternative to the preferred remedy of ejectment. This Court's decision in *City of Sherrill* supports the district court's reliance on equitable factors as a basis for denying the Cayugas their preferred remedy, but it in no way suggests that the suit should have been dismissed *ab initio*.

2. Respondents also contend (Br. in Opp. 14) that the district court's damages award is disruptive because it "flow[s] directly from the finding that the Cayugas are entitled to possession" of the relevant lands. Respondents further suggest (*id.* at 16) that the damages award, if not reversed, could serve as a predicate for additional relief that "could jeopardize local mortgages and inhibit investment in local real estate and businesses." Those arguments are misconceived.

The district court held that the Cayugas had never lawfully been divested of title to the relevant lands, and that their right to possession had therefore been violated. The court took pains, however, to fashion a remedy that would *finally* resolve the Cayugas' claims *without* calling into question the right of current occupants to remain on the land or to sell the property to others. In light of the care taken by the district court to avoid the disruptive consequences that respondents hypothesize, the court's decision could not reasonably be invoked to support a future order that would cast doubt on current patterns of land occupancy and ownership in the region.

The apparent thrust of respondents' argument is that, because equitable considerations precluded the district court from following its core merits ruling (*i.e.*, that the Cayugas were unlawfully divested of their lands in 1795 and 1807) to its logical remedial conclusion, the court could not order any

relief at all—or even determine that the Cayugas' rights were violated. *City of Sherrill* provides no support for that all-or-nothing conception of the district court's remedial authority. To the contrary, the Court in *City of Sherrill* praised the district judge who presided over this case for "transcend[ing] the theoretical" and adopting "a pragmatic approach" in his conduct of the parallel Oneida land-claim litigation, in which the judge (as here) denied an ejectment remedy while determining that damages from parties other than private landowners would remain available. 125 S. Ct. at 1488 (quoting *Oneida Indian Nation* v. *County of Oneida*, 199 F.R.D. 61, 92 (N.D.N.Y. 2000)); see Pet. 16. This Court quoted with approval the district court's observation that there "is a sharp distinction between the *existence* of a federal common law right to Indian homelands and how to *vindicate* that right." 125 S. Ct. at 1489 (quoting *Oneida Indian Nation*, 199 F.R.D. at 90). Respondents' contention that the unavailability of actual ejectment requires dismissal of the underlying claims is the antithesis of the "pragmatic approach" that the *City of Sherrill* Court endorsed.[1]

3. Respondents contend (Br. in Opp. 17) that "the potential award of billions of dollars in money damages in this case and the other New York land claim cases would have a dramatic impact on the State's budgetary and fiscal planning and place an extraordinary burden on the State's taxpayers." It is perverse, however, to suggest that the magnitude of the Cayugas' injury—which reflects the magnitude of the State's wrong—is a basis for denying the United States and the Cayugas any

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[1] As respondents observe (Br. in Opp. 13), this Court in *City of Sherrill* "noted approvingly the refusal of the same district judge who handled this case to eject 20,000 landowners in the Oneida land claim." It surely did not escape this Court's attention, however, that the district court in the Oneida land-claim suit noted the potential availability of damages from other defendants and allowed the suit to continue even after holding ejectment to be inappropriate.

relief whatever. The district court relied on various equitable considerations in reducing by 60% the amount of prejudgment interest that it awarded. Pet. App. 320a; see Pet. 8, 27 n.7. If this Court grants certiorari and reverses the judgment of the Second Circuit, respondents are free to argue on remand (to the extent that the issue has been properly preserved) that further reduction of the prejudgment interest award would be appropriate. The size of the award cannot, however, properly be treated as a justification for dismissal of the suits filed by the United States and the Cayugas.[2]

B. The Court Of Appeals' Decision Conflicts With Congress's Judgment That Claims Like These Should Be Permitted To Go Forward

As the certiorari petition of the United States explains (at 21-25), the court of appeals' dismissal of these suits on the ground of laches is particularly inappropriate because Congress, in 28 U.S.C. 2415(b) and in the Indian Claims Limitation Act of 1982, Pub. L. No. 97-394, 96 Stat. 1976 (1982 Act), enacted provisions governing the timeliness of the damages claims at issue here. Respondents contend (Br. in Opp. 19-20) that Section 2415(b) and the 1982 Act are inapplicable because 28 U.S.C. 2415(c) states that "[n]othing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property." Respondents' reliance on Section 2415(c) is misplaced.

By its terms, 28 U.S.C. 2415(b) encompasses "every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort." Section

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[2] Respondents seek (Br. in Opp. 17) to distinguish this Court's decision in *Oneida II* on the ground that *Oneida II* culminated in a relatively modest damages award. The suit in *Oneida II*, however, was understood to be a "test case" brought to clarify the legal principles that would govern litigation involving much larger tracts of land. *City of Sherrill*, 125 S. Ct. at 1486.

2415(b) covers "action[s] to recover damages resulting from a trespass on lands of the United States" and "action[s] for conversion of property of the United States," as well as suits within those categories that are brought "for or on behalf of a recognized tribe, band or group of American Indians, including actions relating to allotted trust or restricted Indian lands." 28 U.S.C. 2415(b). Section 2415(c)'s reference to "action[s] to establish the title to, or right of possession of, real or personal property," 28 U.S.C. 2415(c), should not be read so broadly as to subvert Congress's intent that *damages* actions for trespass or conversion would be subject to defined statutory limitations periods. Subsections (b) and (c) are best reconciled by construing 28 U.S.C. 2415(c) as limited to suits seeking *prospective* relief establishing title or right of possession, not as extending to damages claims in which title to real or personal property is an element of the cause of action.[3]

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[3] Section 2415(c) was enacted in 1966 as part of the law that first established a statute of limitations governing suits by the United States. See Pub. L. No. 89-505, 80 Stat. 304; Pet. 21. The legislative history explains that Section 2415(c) "makes it clear that no one can acquire title to Government property by adverse possession or other means. This is done by providing that there is no time limit within which the Government must bring actions to establish title to or right of possession of real or personal property of the United States." S. Rep. No. 1328, 89th Cong., 2d Sess. 3 (1966); see H.R. Rep. No. 1534, 89th Cong., 2d Sess. 5 (1966) (identical language). Congress's intent to preclude the acquisition of government property through adverse possession is fully consistent with its decision to limit the time within which the United States may seek *damages* for *prior* trespasses or conversions.

At least with respect to the complaint filed by the United States on the Cayugas' behalf, moreover, 28 U.S.C. 2415(c) is particularly unhelpful to respondents' position, since the United States' suit clearly would not be time-barred if it were encompassed by Section 2415(c). In providing that government suits "to establish the title to, or right of possession of, real or personal property" are not subject to the limitations periods contained in other subsections of 28 U.S.C. 2415, Congress did not anticipate that such actions would be subject to *alternative* timing requirements. Rather, Congress

That reading of 28 U.S.C. 2415(b) and (c) is also consistent with the manner in which the Secretary of the Interior has administered the 1982 Act. The 1982 Act required the Secretary to publish, within 90 days of the law's enactment, a list of Indian claims "which, but for the provisions of [the 1982] Act, would be barred by the provisions of section 2415 of title 28, United States Code." 1982 Act, § 3(a), 96 Stat. 1977. The Secretary included the Cayuga land claim on the required list, see 48 Fed. Reg. 13,920 (1983); Pet. 22, and explained that "[t]he vast majority of the listed claims involve trespasses to Indian land," 48 Fed. Reg. at 13,698. Inclusion of the Cayugas' claim on that list would have been superfluous if, as respondents contend, the limitations period set forth in 28 U.S.C. 2415 were inapplicable to damages actions alleging trespass onto or conversion of tribal lands.[4]

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intended that there would be "no time limit" at all for such suits. S. Rep. No. 1328, *supra*, at 3; H.R. Rep. No. 1534, *supra*, at 5; see Pet. 25-27 (explaining that principles of laches do not apply when the United States sues in its sovereign capacity); pp. 8-9, *infra* (same). Respondents' contention that the United States' suit is encompassed by Section 2415(c) therefore undermines its argument that the suit should be dismissed. See *Oneida II*, 470 U.S. at 243-244 n.15.

[4] Respondents also contend (Br. in Opp. 20) that "laches may bar actions that are otherwise within the statute of limitations," but the cases they cite (*id.* at 20-21) do not support their position here. In *Holmberg* v. *Armbrecht*, 327 U.S. 392, 393-398 (1946), the Court held that a federal court sitting in equity should apply federal principles of laches rather than borrowing a state statute of limitations. *Alsop* v. *Riker*, 155 U.S. 448 (1894), also involved a potentially applicable state-law limitations period (*id.* at 460), and the Court, in holding that the plaintiff's suit for equitable relief should be dismissed on the ground of laches (*id.* at 460-461), stated that the dismissal would be "without prejudice to an action at law" (*id.* at 461). The Court in *Gardner* v. *Panama R.R.*, 342 U.S. 29, 30-31 (1951) held that, when the plaintiff's earlier timely-filed suit had been abated through an amendment to the Federal Tort Claims Act, her subsequent admiralty action was not barred by laches even though the applicable statute of limitations would have precluded any suit at law. None of

C. The United States Is Not Subject to Laches When It Sues In Its Sovereign Capacity

Relying on *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355 (1977), and *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984), respondents contend (Br. in Opp. 21) that "an action by the United States may be precluded by laches, even when the United States is acting in its sovereign capacity." Respondents' reliance on those decisions is misplaced. In *Occidental Life*, the Court indicated that the Equal Employment Opportunity Commission's undue delay in seeking backpay may be relevant to the *amount* of any monetary remedy, but it did not suggest that such delay could provide a basis for dismissal of the suit *ab initio*. 432 U.S. at 372-373; Pet. 27 n.7. And *Community Health Services* involved estoppel against the government, not laches. The Court in *Community Health Services*, while noting the "substantial" arguments favoring a categorical ban on the application of estoppel against the United States, left open the possibility that exceptional cases might arise in which estoppel could appropriately be invoked against the government. 467 U.S. at 60-61. The Court made clear, however, that a party claiming estoppel against the government must demonstrate, at a minimum, that it reasonably relied to its detriment on the government's misrepresentations of fact. See *id.* at 59, 61. Respondents can make no such showing.

"As has been its strategy throughout this litigation, the State attempts to divert attention away from its own actions by pointing the finger at the Federal Government." Pet. App. 293a (district court opinion). Undoubtedly there have been lengthy periods of this Nation's history during which federal officials were less than vigilant in their enforcement of the

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those cases suggests that a claim for damages can be dismissed on the ground of laches when suit is filed within a limitations period established by Congress.

Trade and Intercourse Acts.[5] The federal government's prior failures to prevent or to obtain redress for illegal purchases of tribal land, however, cannot reasonably be equated with the State's deliberate violations of the law, through which New York derived a substantial profit.[6]

D. The Decision Below Warrants This Court's Review

More than 20 years ago, this Court in *Oneida II* allowed tribal land claims like these to go forward, rejecting the contention that the suits were time-barred. See Pet. 14. Respondents contend (Br. in Opp. 18) that the decision below does not conflict with *Oneida II* because this Court in *Oneida II* did not rule definitively on the availability of a laches defense. As our petition for a writ of certiorari explains (at 14), however, the Court was scarcely agnostic as to the applicability of

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[5] As the Court observed in *Oneida II*, the legislative history of the 1982 Act and its statutory predecessors (see Pet. 21-22) "is replete with evidence of Congress' concern that the United States had failed to live up to its responsibilities as trustee for the Indians." 470 U.S. at 244. Congress reacted to those prior failures, however, not by declaring ancient land claims to be extinguished, but by enacting a statute that *preserves* such claims. Under the limitations provisions of that statute, the suits filed by the Cayugas and by the United States are indisputably timely.

[6] Respondents note (Br. in Opp. 5-6 & n.7) that federal Indian agents were present and witnessed the agreements in 1795 and 1807 by which the State sought to purchase land from the Cayugas. Respondents do not seriously contend, however, that the federal government authorized the transactions as required by the Trade and Intercourse Acts, which required formal ratification by a Treaty of the United States. Indeed, the district court found that the 1795 and 1807 sales did not receive the requisite federal approval. See Pet. App. 442a. Respondents further suggest (*e.g.*, Br. in Opp. 1) that the Cayugas acquiesced in the dispossession of their land until the first of these suits was filed in 1980. The district court, however, described the Cayugas' sustained efforts from 1853 until 1980 to obtain additional compensation from the State (Pet. App. 294a-298a), and in any event inaction by a Tribe does not erase a violation of the Trade and Intercourse Acts.